

Wells Fargo Bank. N.A. v Riegel

2018 NY Slip Op 32556(U)

September 26, 2018

Supreme Court, Suffolk County

Docket Number: 007481/2012

Judge: James Hudson

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This opinion is uncorrected and not selected for official publication.

**Supreme Court of the County of Suffolk
State of New York - Part XL
Memorandum Decision**

COPY

PRESENT:

HON. JAMES HUDSON

Acting Justice of the Supreme Court

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WELLS FARGO BANK, N.A., SUCCESSOR BY
MERGER TO WELLS FARGO BANK MINNESOTA,
N.A., AS TRUSTEE F/K/A NORWEST BANK
MINNESOTA, N.A., AS TRUSTEE FOR THE
REGISTERED HOLDERS OF RENAISSANCE HOME
EQUITY LOAN ASSET-BACKED CERTIFICATES,
SERIES 2003-3,

Plaintiff,

-against-

LENORE RIEGEL,

Defendant.

X-----X

ORDERED that the motion (seq. no.:004) of Defendant requesting that the June 29th, 2016 default judgment be vacated due to reasonable excuse for default and a meritorious defense pursuant to CPLR Rule 5015(a) (1) and CPLR §3012 (d) and; dismissal of the foreclosure case due to lack of standing of Plaintiff pursuant to RPAPL §§1303 and 1306, is denied in its entirety.

This is a matter seeking foreclosure and sale of residential real property situate in Bay Shore, Suffolk County, New York. On August 22nd, 2003 Defendant/Mortgagor Lenore Riegel closed on a first mortgage with mortgagee/assignor which through assignment is now Plaintiff, secured by a note and mortgage on 28 Krause Street, Bay Shore, NY 11706. Defendant ceased payment on that loan, failing to make the mortgage payment on August 1st,

2011 and continuing thereafter.

On February 22nd, 2012, having complied with the notice requirements of RPAPL §§1304 and 1306, Plaintiff commenced this foreclosure action. On March 20th, 2012 Defendant was personally served. Two (2) CPLR Rule 3408 mandatory settlement conferences were scheduled on August 9th, 2013 and October 17th, 2013. Defendant failed to appear at either settlement conference.

Defendant failed to answer the complaint and did not appear in the case prior to filing the instant Motion. On June 29th, 2016 default judgment was granted to the Plaintiff. On October 5th, 2016 Defendant filed the instant motion to vacate default, and on October 18th, 2016 Plaintiff served its opposition to that motion.

Absent a “viable jurisdictional claim,” a party in default may not move for affirmative relief without an order relieving such defendant from his or her default in place at the time affirmative relief is demanded *see (U.S. Bank Natl Assn. v. Gonzalez*, 99 AD3d 692, 952 NYS2d 59 [2d Dept 2012]; *Holubar v. Holubar*, 89 AD3d 802, 934 NYS2d 710 [2d Dept 2011]; *McGee v. Dunn*, 75 AD3d 624, 906 NYS2d 74 [2d Dept 2010]).

Defendant, being untimely in her appearance in the case must first demonstrate an excusable default for failing to appear and a meritorious defense in the case. In the event Defendant demonstrates such excuse and defense, the Court may then consider Defendant’s argument that Plaintiff lacks standing, and for that reason the case should be dismissed.

Vacatur of Default CPLR Rule 5015 (a)(1), CPLR §3012 (d)

CPLR Rule 5015. Relief from judgment or order provides, in pertinent part:

“(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. ...excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or...” McKinney’s CPLR Rule 5015 [2018].

CPLR §3012. Service of pleadings and demand for complaint provides, in pertinent part:

“(d) Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.” McKinney’s CPLR §2012 [2018].

A determination of what constitutes a reasonable excuse, “...lies within the sound discretion of the Supreme Court” (*Equicredit Corp. of America v. Campbell*, 73 AD3d 1119, 1120, 900 NYS2d 907 [2d Dept 2010]; see also *Star Industries, Inc. v. Innovative Beverages, Inc.*, 55 AD3d 903, 904, 866 NYS2d 857 [2d Dept 2008]).

A good faith belief in settlement, supported by substantial evidence, constitutes a reasonable excuse for default (*Scarlett v. McCarthy*, 2 AD3d 623, 768 NYS2d 342 [2d Dept 2009], [holding that a party’s engagement in settlement discussions is a reasonable excuse under CPLR Rule 5015(a)(1)]; see also *Lehrman v. Lake Katonah Club*, 295 AD2d 322, 744 NYS2d 338 [2d Dept 2002]).

The Second Department has repeatedly held that a defendant making application for an extension of time to plead pursuant to CPLR §3012 (d), must not only provide a reasonable excuse for the delay, but also “demonstrate a potentially meritorious defense to the action” (*Deutsche Bank Natl Trust Co. v. Kuldip*, 136 AD3d 969, 25 NYS3d 653 [2d Dept 2016]; *see also KI 12, LLC v. Joseph*, 137 AD3d 750, 26 NYS3d 573 [2d Dept 2016]).

It is noted that Defendant was served with all papers in this case. Defendant was on actual notice of the foreclosure case for a period of four (4) years prior to the filing of her instant motion. The case record reflects that Defendant never appeared during that four (4) year period. It is also noted that two (2) CPLR Rule 3408 mandatory foreclosure conferences were scheduled and Defendant failed to appear at either conference.

The Court is sympathetic to the health issues asserted by Defendant in her motion. The Court does not find that excuse sufficient to vacate the lengthy default by Defendant. The Court notes that Defendant filed her instant motion one (1) day prior to the scheduled sale of the premises. Same action by Defendant is indicative of her understanding of the consequences of foreclosure, but does not excuse her prior failure to respond to the filed court action nor her failure to attend either foreclosure conference.

Clearly, by the filed motion exhibits, particularly letters from Defendant’s physicians, Defendant asserts that her excuse for default is grounded in her health issues. The Court notes that the filed exhibits are dated during 2016, just prior to the instant motion to vacate default. The Court also notes an August 2nd, 2016 Attorney’s letter which references a July, 2016 hearing request for social security disability benefits for Defendant. That correspondence does not reference the reason for that application nor when the alleged disabling condition manifested itself or was diagnosed, nor the nature or kind of disability alleged. The Court notes that some of the filed exhibits are of questionable relevance; in particular those related to a 2012 Order of Protection in favor of Defendant.

The filed exhibits, *in toto*, are insufficient in support of Defendant's request to find excuse for her four (4) year default in making any response or appearance in this foreclosure case.

The balance of Defendant's excuses for her default are considered and found not to be relevant nor reasonable to excuse that default.

Defendant's request that the default judgment be vacated due to excusable default pursuant to CPLR Rule 5015(a)(1) is denied.

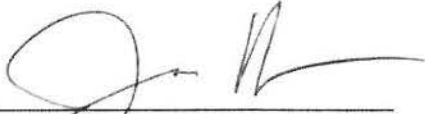
As correctly pled in Plaintiff's opposition to the instant motion:

"Since the Defendant failed to demonstrate a reasonable excuse for her default, it is unnecessary to determine whether she demonstrated the existence of a potentially meritorious defense" (*Deutsche Bank National Trust Company v. Piertranico*, 102 AD3d 724, 725, 957 NYS2d 868 [2d Dept 2013]; *see U.S. Bank N.A. v. Stewart*, 97 AD3d 740, 948 NYS2d 411 [2d Dept 2012]; *Reich v. Redley*, 96 AD3d 1038, 947 NYS2d 564 [2d Dept 2012]).

Defendant has failed to demonstrate excusable default pursuant to CPLR Rule 5015 (a) (1). Defendant's request for an extension of time to appear or plead upon a showing of reasonable excuse for default pursuant to CPLR §3012 (d) and by demonstration of a potentially meritorious defense is denied.

The foregoing decision constitutes the Order of the Court.

DATED: SEPTEMBER 26th, 2018
RIVERHEAD,



HON. JAMES HUDSON
Acting Justice of the Supreme Court